

Regular Session, 2010

SENATE BILL NO. 256

BY SENATOR CHAISSON

COMMERCIAL REGULATIONS. Enacts the Louisiana Exchange Sale of Receivables Act.
(gov sig)

AN ACT

To enact Part IV of Chapter 4 of Code Title VII of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 9:3131.1 through 3131.9, relative to the Louisiana Exchange Sale of Receivables Act; to provide for legislative intent; to provide for definitions; to provide for the scope; to provide for the true sale status of sales of receivables over exchanges located in Louisiana; to provide for the binding effectiveness of Louisiana law to such sales of receivables; to provide for buyer ownership rights; to provide for relationship with the Uniform Commercial Code; to provide for agreements; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Part IV of Chapter 4 of Code Title VII of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950, comprised of R.S. 9:3131.1 through 3131.9, is hereby enacted to read as follows:

PART IV. LOUISIANA EXCHANGE SALE OF RECEIVABLES ACT

§3131.1. Short title

This Part shall be known and may be cited as the "Louisiana Exchange Sale of Receivables Act".

1 **§3131.2. Legislative intent**

2 **A. It is the intent of the legislature to encourage and promote businesses**
3 **to offer sellers the ability to sell their receivables to qualified buyers over**
4 **electronic and other types of exchanges located in this state, thereby availing**
5 **themselves of Louisiana civil law principles not found in common law**
6 **jurisdictions, and further availing themselves of the true sale provisions of this**
7 **Part and R.S. 10:9-109(e).**

8 **B. The legislature declares the following actions to be the public policy**
9 **of this state.**

10 **(1) All sales of receivables over exchanges located in Louisiana shall be**
11 **subject to Louisiana law, and specifically subject to this Part and to R.S. 10:9-**
12 **109(e).**

13 **(2) Such sales shall result in true sales for all purposes and not be limited**
14 **to a bankruptcy context.**

15 **(3) Such sales shall not be subject to recharacterization as a simulated**
16 **sale or as a loan, extension of credit, or other credit accommodation by the**
17 **buyer to the seller, notwithstanding that the seller may be obligated to**
18 **repurchase the receivable, or the buyer may have other recourse against the**
19 **seller, if the receivable is not timely paid, and further notwithstanding that the**
20 **seller may be entitled to receive a portion of the collection proceeds.**

21 **C. This Part and R.S. 10:9-109(e) specifically reject common law legal**
22 **theories under which recourse sales of receivables have been recharacterized as**
23 **loans or credit accommodations, as being contrary to Louisiana civil law**
24 **principles that apply to sales of receivables over exchanges located in this state.**

25 **§3131.3. Definitions**

26 **A. For the purposes of this Part, the following terms shall have the**
27 **following meanings unless the context clearly indicates otherwise.**

28 **(1) "Buyer" means the person buying a receivable over an exchange**
29 **located in this state.**

1 (2) "Collection proceeds" means any amounts received or otherwise
2 collected from the person owing the receivable, including the account debtor or
3 a guarantor of the payment obligation.

4 (3) "Consummate" means to complete all agreements, steps and actions
5 necessary for a sale of receivables to be deemed to be complete under Louisiana
6 law, with ownership of the purchased receivable passing from the seller to the
7 buyer.

8 (4) "Exchange" means an electronic or other marketplace over which
9 sellers may offer and sell their receivables to qualified buyers.

10 (5) "Operational employees" means and refers to employees whose work
11 responsibilities are primarily devoted to performing operations-related
12 functions related to the exchange and persons transacting business over the
13 exchange, as compared to employees whose primary work responsibilities are
14 devoted to managerial, marketing, sales, internal accounting and other non-
15 operational functions.

16 (6) "Receivable" means an account, general intangible, payment
17 intangible, chattel paper or instrument as defined under the UCC. Receivables
18 shall also include third-party payment obligations that are not subject to the
19 UCC. Receivables shall not be limited to United States domestic payment
20 obligations, and shall include receivables owed by non-United States persons
21 and entities as well as receivables originating out of non-United States
22 transactions.

23 (7) "Seller" means the person offering a receivable for sale over an
24 exchange located in this state.

25 (8) "True sale" means a consummated sale of all rights, title and
26 interests that the seller may have in a receivable sold over an exchange located
27 in this state, with the buyer acquiring all of the seller's rights and interests, and
28 with the seller retaining no residual or equitable rights therein.

29 (9) "UCC" means the Uniform Commercial Code of any state and the

1 comparable laws of foreign non-United States jurisdictions. In Louisiana,
2 "UCC" means and refers to Chapter 9 of the Louisiana Uniform Commercial
3 Code, R.S. 10:9-101, et seq.

4 B. All terms used, but not defined in this Part, shall have the meanings
5 found in the UCC, the Louisiana Revised Statutes of 1950, and the Louisiana
6 Civil Code.

7 §3131.4. Scope

8 A. This Part shall apply to all sales of receivables over exchanges located
9 in this state irrespective of whether the buyer or the seller of the receivable is
10 a Louisiana resident, business organization or other entity, so long as the buyer
11 and the seller contractually agree that such sales shall be deemed to be
12 consummated in Louisiana subject to Louisiana law, and such sales of
13 receivables result in true sales for all purposes.

14 B. An exchange shall be conclusively deemed to be located in this state
15 when the exchange is owned and operated by a Louisiana business organization
16 having fifty percent or more of its operational employees located in this state,
17 and such Louisiana business organization declares in an affidavit filed in the
18 conveyance office of the parish in which the organization has its principal place
19 of business, that the affiant maintains its principal place of business in that
20 parish. An exchange owner or operator located in this state may have
21 additional sales and other offices, as well as managerial, sales, marketing,
22 accounting and other operational and non-operational employees located in
23 other jurisdictions, so long as the company has fifty percent or more of its
24 operational employees in Louisiana. In the case of an electronic exchange
25 conducting exchange business over the Internet or other electronic media, the
26 company's servers and electronic interchanges need not be physically located
27 in Louisiana.

28 §3131.5. True sales of receivables; not subject to recharacterization; simulation

29 articles not applicable

1 A. All sales of receivables over exchanges located in this state shall
2 conclusively result in consummated true sales for all purposes, and not be
3 limited to a bankruptcy context, with the buyer acquiring all of the seller's
4 rights, title and interests in and to the traded receivables and the collection
5 proceeds thereof, and with the buyer retaining no vestiges of legal or equitable
6 ownership whatsoever.

7 B. As true sales, sales of receivables over exchanges located in this state
8 shall not be subject to recharacterization as loans, extensions of credit, or other
9 credit accommodations by the seller to the buyer, notwithstanding that the
10 seller may be obligated to repurchase the receivable, or the buyer may
11 otherwise have recourse against the seller if the receivable is not paid when due,
12 and further notwithstanding that the seller may be entitled to receive a portion
13 of the collection proceeds. Furthermore, sales of receivables over exchanges
14 located in this state shall not be construed, under any circumstance, to be a
15 simulated sale under the simulation articles of the Louisiana Civil Code.

16 C. (1) The seller's written agreement in the underlying documents that
17 the seller absolutely, unconditionally, and irrevocably intends that sales of the
18 seller's receivables over an exchange located in this state result in true sales of
19 such receivables for all purposes, shall be definitive and binding on the seller,
20 and may not be subsequently disavowed, refuted or called into question by any
21 of the following persons:

22 (a) The seller.

23 (b) The seller's successors or assigns, or any person acquiring rights
24 from or through the seller, including the buyer.

25 (c) Past and future owners, directors, officers, employees, agents,
26 representatives and attorneys of the seller, or of its successors or assigns, or any
27 person acquiring rights from or through the seller.

28 (d) The account debtor or any other person obligated to pay the
29 receivable.

1 (e) All other third persons.

2 (2) Any person, including anyone listed in Paragraph (1) of this
3 Subsection, attempting to recharacterize a sale of a receivable over an exchange
4 located in this state as anything other than a true sale under Louisiana law, shall
5 be personally liable and obligated by operation of law to reimburse the buyer
6 and the buyer's agents for attorney fees, court costs, arbitration costs, expert
7 fees, and out-of-pocket expenses, including but not limited to travel expenses,
8 expended in defense of the status of such sale as a true sale under Louisiana law.

9 §3131.6. Binding effectiveness of Louisiana law

10 A. Louisiana law, and specifically this Part and R.S. 10:9-109(e), shall
11 apply to all sales of receivables over exchanges located in this state irrespective
12 of the domicile or other location of the buyer or the seller.

13 B. (1) The seller's written agreement and choice of law covenant in the
14 underlying documents that Louisiana law shall apply to all sales of the seller's
15 receivables over an exchange located in this state, shall be definitive for all
16 purposes, and shall be absolutely, unconditionally and irrevocably binding on
17 the seller, and shall not be subsequently disavowed, refuted, or called into
18 question by any of the following persons:

19 (a) The seller.

20 (b) The seller's successors or assigns, or anyone acquiring rights from or
21 through the seller, including the buyer.

22 (c) Past and future owners, directors, officers, employees, agents,
23 representatives and attorneys of the seller, or of its successors or assigns, or
24 anyone acquiring rights from or through the seller.

25 (d) The account debtor or person obligated to pay the receivable.

26 (e) All other third persons.

27 (2) Any person, including anyone listed in Paragraph (1) of this
28 Subsection, attempting to contest the applicability of Louisiana law and to apply
29 the laws of another state or jurisdiction to the sale of the seller's receivables

1 over an exchange located in this state, shall be personally liable and obligated
2 by operation of law to reimburse the buyer and the buyer's agents for all
3 attorney fees, court costs, arbitration costs, expert fees, and out-of-pocket
4 expenses, including but not limited to travel expenses expended in defense of the
5 status of such a sale as a true sale under Louisiana law.

6 C. For the further purpose of applying relevant conflicts of law
7 principles, the legislature declares that Louisiana public policy shall be most
8 seriously impaired to the extent that the laws of another state or jurisdiction
9 might be applied to sales of receivables over exchanges located in Louisiana.
10 As sales of receivables take place in Louisiana over Louisiana-based exchanges,
11 Louisiana shall be deemed to have the most significant contact with the
12 underlying sales transaction.

13 §3131.7. Buyer ownership rights; evidence of ownership

14 A. The buyer shall be deemed for all purposes, and not be limited to a
15 bankruptcy context, to be the owner of a receivable purchased over an exchange
16 located in this state, with the buyer having the right to all of the following
17 actions:

18 (1) To collect the receivable from the account debtor or other obligated
19 person.

20 (2) To resell the receivable to a subsequent buyer.

21 (3) To pledge or otherwise grant a security interest in the receivable in
22 favor of the buyer's creditor.

23 (4) To reflect the receivable as an asset on the buyer's books and records.

24 B. To the extent that the owner or operator of an exchange located in
25 this state maintains records of sales of receivables over the exchange, such
26 records shall serve as the single authoritative record evidencing buyer
27 ownership of traded receivables for all purposes.

28 §3131.8. Relationship to the UCC

29 A. This Part supplements R.S. 10:9-109(e), and shall not be construed

1 to amend or impliedly repeal the provisions thereof.

2 B. This Part and R.S. 10:9-109(e) shall not be construed to conflict with,
3 and shall not displace any of the following existing laws:

4 (1) The filing perfection requirements of R.S. 10:9-301, 9-307, 9-310(a),
5 9-312(a), and 9-501 requiring that the buyer file a UCC financing statement in
6 the required location in the seller's jurisdiction of organization, or in the
7 District of Columbia as applicable, to place third persons on notice that the
8 buyer is or may be purchasing the seller's receivables.

9 (2) The priority provisions of R.S. 10:9-317, and 9-319 through 9-339.

10 (3) The account debtor notification provisions of R.S. 10:9-406 and 9-
11 607(a)(1).

12 C. This Part and R.S. 10:9-109(e) provide for and define the true sale
13 status and the state property ownership rights of buyers of receivables
14 purchased over exchanges located in this state, and shall not independently
15 provide for rules governing perfection, the effects of perfection or
16 nonperfection, or the priority rights of buyers of receivables purchased over
17 Louisiana based exchanges within the context of R.S. 10:9-301.

18 §131.9. Agreements to be in writing

19 A seller shall not maintain an action or have any claim against an owner
20 or operator of an exchange located in this state, or against a buyer of the seller's
21 receivables, unless the agreement is in writing, sets forth the relevant terms and
22 conditions, and is signed by the seller and the owner or operator on its own
23 behalf and as agent for the buyer.

24 Section 2. This Act shall become effective upon signature by the governor or, if not
25 signed by the governor, upon expiration of the time for bills to become law without signature
26 by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If
27 vetoed by the governor and subsequently approved by the legislature, this Act shall become
28 effective on the day following such approval.

The original instrument was prepared by Alan Miller. The following digest, which does not constitute a part of the legislative instrument, was prepared by McHenry Lee.

DIGEST

Present law protects purchasers of accounts, chattel paper, payment intangibles, or promissory notes by providing a notice filing system.

Present law provides that in the absence of fraud or intentional misrepresentation, the parties characterization of a sale of accounts, chattel paper, payment intangibles, or promissory notes is conclusive that the transaction is a true sale, and not a secured transaction.

Proposed law retains present law.

Proposed law provides for legislative intent that specifically rejects common law legal theories under which recourse sales of receivables can be recharacterized as loans or credit accommodations, as being contrary to La. civil law principles that apply to sales of receivables over exchanges located in La.

Proposed law defines an "exchange" as an electronic or other marketplace over which sellers may offer and sell their receivables to qualified buyers.

Proposed law applies to all sales of receivables over exchanges located in La., irrespective of whether the buyer or the seller of the receivable is a La. resident, business organization or other entity, so long as the buyer and the seller contractually agree that such sales are deemed to be consummated in La., subject to La. law, and such sales of receivables result in true sales for all purposes.

Proposed law deems conclusively that an exchange is located in La. when the exchange is owned and operated by a La. business organization having 50% or more of its operational employees located in La., and that the La. business organization declares in an affidavit filed under oath in the conveyance office of the parish in which the organization has its principal place of business, that the affiant maintains its principal place of business in that parish.

Proposed law deems that all sales of receivables over exchanges located in La. conclusively result in consummated true sales for all purposes, and are not limited to a bankruptcy context.

Proposed law deems that sales of receivables over exchanges located in La. are not subject to recharacterization.

Proposed law deems that sales of receivables, as evidenced by the seller's written agreement, over exchanges located in La. are binding on the seller.

Proposed law provides that any person attempting to recharacterize a sale of a receivable over an exchange located in La. as anything other than a true sale is personally liable and obligated to reimburse the buyer for costs expended in defense of the status of the sale as a true sale.

Proposed law applies to all sales of receivables over exchanges located in La., irrespective of the domicile or other location of the buyer or the seller.

Proposed law provides that the buyer is deemed to be the owner of the purchased receivable, and has the right to all of the following actions:

- (1) To collect the receivable from the account debtor or other obligated person;

- (2) To resell the receivable to a subsequent buyer;
- (3) To pledge or otherwise grant a security interest in the receivable in favor of the buyer's creditor; and
- (4) To reflect the receivable as an asset on the buyer's books and records.

Proposed law is deemed to supplement and not to conflict with pertinent provisions of the UCC.

Proposed law requires that agreements regarding sales of receivables over exchanges located in La. be in writing.

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Adds R.S. 9:3131.1-3131.9)

Summary of Amendments Adopted by Senate

Senate Floor Amendments to engrossed bill.

- 1. Legislative Bureau technical amendments.